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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 261

CARL MICHAEL MIRABILE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Brief for Petitioner In Reply to Brief for the United States in Opposition

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ARGUMENT

I. This was a close case.

The Respondent, in its effort to minimize the effect of the prosecutor's admitted misconduct, urges this Court to view this case as one in which there had been "strong evidence of guilt," relying heavily upon the fact that the Petitioner accompanied Nicholas Borozzi to Mexico.

It was undisputed that in the first days of April, 1962 the Petitioner and Borozzi took a trip from Baltimore, Maryland, to Mexico, and that, on the evening of April 10th, Borozzi alone was arrested after he crossed the Rio Grande near Laredo, Texas, with a suitcase full of marihuana. The theory of the prosecution was that the two had been in

Texas while parties to a smuggling scheme, and that Borozzi, when he was arrested, was acting in furtherance of the joint venture. The defense, on the other hand, maintained that Mirabile took the trip for pleasure and that he abandoned Borozzi after the latter had unexpectedly purchased eighteen pounds of marihuana in Monterrey, Mexico and made clear his intention of bringing it into the United States.

Although the prosecution charged that the sole purpose of the trip to Mexico was the procurement of marihuana for smuggling, no evidence was introduced by the Government of any event prior to the entry of the defendants into the Republic of Mexico on April 7, 1962. The Petitioner's testimony, which was uncontradicted, was that in the first days of April, his friend, Borozzi, informed him that he was planning a pleasure trip to Mexico and invited him to come along. Borozzi offered to loan him the money for the trip if he would supply the car, and since he had not had a vacation in several years, he accepted the offer (R. 104-105, 122-123, 132). Borozzi was in need of a suitcase to carry his clothes, and the Petitioner obtained one from his girl friend, a girl named Jacqueline Gay, which was loaned to Borozzi for his use (R. 132-133).

The two men left on a Thursday afternoon, and, between 8:00 and 9:00 o'clock on Saturday evening, they arrived at Laredo, Texas, entering Mexico at that point (R. 105). The defendants drove to Monterrey, Mexico, and, on the day after their arrival, they met Hector Rodriguez, a tourist guide. Rodriguez himself conceded that the Petitioner did not seek him out or solicit him in any way, but that he called to Borozzi and Mirabile as they were driving down the street, stopped them, and offered to get them anything they wanted (R. 54). Mirabile testified that Borozzi, in

response to Rodriguez's offer, asked for marihuana to smoke and that Rodriguez then introduced Borozzi to a friend of his named Jesse (R. 108).

After the introduction to Jesse, the Petitioner said, Borozzi went away with Jesse and left him with Rodriguez (R. 108). Mirabile admitted, quite candidly, that he had smoked marihuana in the past and that he assumed that Borozzi "was just going to get some stuff to smoke while we were down there." Half an hour later, Borozzi returned. He informed Mirabile that he had given "some money" to Jesse, but no mention was made about any large quantity of marihuana (R. 109).

After Borozzi's return from his private meeting, his activities with Mirabile were those of a tourist. Together with Rodriguez, they went to the bull fights, to a restaurant and, later, to a waterfall where they went horseback riding. (R. 109). The next day, after more sightseeing, the defendants met Rodriguez for a second time, and they went to a pool room with him. While they were playing pool, Jesse arrived for another private meeting with Borozzi and the two of them conferred carefully out of Mirabile's hearing. Turning to Mirabile when he had finished talking with Jesse, Borozzi announced, "We're going to move out of the Favorita Hotel into the Roegina Apartments" (R. 111). Because the finances were controlled by Borozzi, there was little that Mirabile could do but comply with the instructions given to him (R. 114).

Borozzi, in a conversation with Rodriguez which was also apparently out of Mirabile's hearing, asked Rodriguez if he would bring marihuana to the United States for him. Rodriguez declined to do the job himself, but he introduced Borozzi to his friend, a man named Verduzco, who, after

discussion with Borozzi, undoubtedly associated himself with the latter's venture (R. 35, 56).

Borozzi and Jesse went away again, leaving Mirabile with the instruction that he was to meet them at the Motel Roegina. They found Borozzi and Jesse emptying a large quantity of marihuana from a cardboard box into pillow cases. It was Mirabile's uncontradicted testimony that he had no proprietary interest in that marihuana and that none of his money was used to buy any of it. Before he entered the Motel Roegina, Mirabile said, he had no idea that Borozzi had so much marihuana and he had never seen that much in his life (R. 112-114).

Mirabile said that Borozzi asked him to transport the marihuana in the tires of his car, but that he refused and that the two of them got into an argument (R. 115). Finally, Mirabile recounted, Borozzi accepted his refusal to engage in the smuggling, saying, "Well, take me to Laredo, and I'll give you twenty dollars and you can go" (R. 115).

With certain exceptions, the Government's witness Rodriguez supported Mirabile's account of the events in Monterrey. He conceded that when he stopped the defendants on the street and asked them if they wanted anything, Mirabile spoke to him only about the sights of Monterrey and what there was to see there. Thereafter, he said, it was Borozzi who asked him for the marihuana and directed him to introduce him to Jesse (R. 54). He admitted that at their first meeting Borozzi and Jesse conferred alone and that Mirabile, who displayed no interest in the conversation and who was not invited to participate, stood aside, and that, shortly thereafter, Borozzi and Jesse went away, leaving Mirabile behind (R. 30). At the pool room the next day, he also said, Jesse and Borozzi again conferred out

of Mirabile's hearing and, once more, they went away for "quite some time" without inviting Mirabile along (R. 34). At the Motel Roegina he related, it was Borozzi who paid money to Jesse and it was Borozzi who, singlehandedly, planned the smuggling operation with Verduzco, the man who was to bring the marihuana across the border (R. 37-39). The agreement, he said, was made between Borozzi and Verduzco that the marihuana would be brought in through Laredo, and Rodriguez conceded that Mirabile took no part in the discussion (R. 37-39). Mirabile's undisputed disinterest in both the purchase of the marihuana and the plans for its importation militate strongly against the suggestion that he was a partner in Borozzi's criminal enterprize. On cross-examination, moreover, Rodriguez testified that only Borozzi spoke to him about transporting the marihuana to the United States:

> "Q. Who asked you to transport the marihuana to the United States? A. Nick.
>
> Q. Only Nick? A. Yes, sir, because he was the one that offered to pay me.
>
> Q. Didn't you tell Senor Martinez that both of these fellows asked you to bring the marihuana across? A. No, sir.
>
> Q. You deny that? A. Yes, I remember only Nick" (R. 55).

He corroborated, further, the facts that Borozzi asked Mirabile to put the marihuana in his car, that Mirabile refused, and that Borozzi became angry at Mirabile (R. 59).

The marihuana was packed in a suitcase and it was given to Rodriguez and Verduzco who left by bus for Nuevo Laredo, a Mexican town located across the Rio Grande from Laredo. Mirabile drove Borozzi to Nuevo Laredo, arriving there early in the morning of April 10th (R. 46).

The testimony of Rodriguez and Mirabile as to the events of April 10th, the date on which Borozzi was arrested, was in conflict. Mirabile insisted that he abandoned the conspirators in Nuevo Laredo early in the morning; that he entered the United States at Laredo, Texas where he sent a telegram home; and that he drove back to Baltimore. Rodriguez, on the other hand, claimed that Mirabile was with him in Nuevo Laredo late that day, shortly before Borozzi attempted to cross the river, and, with this as its basis, the Government maintained that Mirabile was probably waiting for Borozzi to cross the river and that he must have left Laredo after the latter had been arrested.

Mirabile's version was corroborated by the testimony of Mr. Ray B. Wright, a health inspector with the United States Public Health Service who was stationed, on April 10th, at the International Bridge at Laredo. It was part of his duties, Mr. Wright said, to vaccinate all persons entering the United States from the interior of Mexico. He produced his records for that day, and, from them, he determined that Mirabile was vaccinated as he entered the United States "between 7:00 and 8:00 in the morning" (R. 61-63).

Mr. A. L. Williams, the manager of the Laredo, Western Union station, produced, from his records, the original telegram which Mirabile sent to Baltimore to his cousin, Mrs. Roberta Mirabile. As Mr. Williams explained, an electric time stamp marks the original telegram when a message is first given for transmission, and the telegram sent by Mirabile was marked, "April 10, a.m. 8:17" (R. 140). The message, which is not without significance, was: "Arrived safely, everything O.K. Will be in Wednesday or Thursday. Love, Carl" (R. 140). April 10th was Tuesday. If, as the prosecution contended, Mirabile remained in the

area until some time after 8:00 p.m., waiting for Borozzi to cross the river, he would have had to have expected to be able to drive the almost 2,000 mile distance to Baltimore in one day. This, of course, is an acknowledged physical impossibility, and the Government never attempted to reconcile the telegram with its prosecutive theory.

Rodriguez, who contradicted Mirabile, claimed that after he and Verduzco arrived by bus in Nuevo Laredo in the morning of April 10th and met Borozzi and Mirabile, the four of them checked into a hotel named the Vera Cruz. He maintained that he and Verduzco first rented a room and that "after a while they [Borozzi and Mirabile] came in, and rented the room next to us" (R. 48). If Mirabile had lingered in Nuevo Laredo that day, the most damaging evidence of this fact would have been the hotel register. No such register was ever produced, however, and no explanation for its absence was ever given.

Rodriguez testified that he and Verduzco arrived in Nuevo Laredo about 7:30 or 8:00 o'clock in the morning (R. 59). After the four of them went to the Vera Cruz Hotel and registered in two stages, he said, Mirabile spent approximately an hour and a half with him (R. 59). Then, he claimed, Mirabile went across to Laredo to buy an innertube on which the marihuana would be floated across the river, and, he maintained, Mirabile returned later (R. 49). This aspect of Rodriguez's testimony is suspect for at least three reasons. First: if the events had transpired as he claimed they did, Mirabile would not have reached the United States until some time after 9:30 a.m., more than an hour and a half later than the time fixed by the independent, reliable witnesses from the Public Health Service and the Western Union. Second: when Rodriguez was interviewed by a representative of the Customs Service

shortly after Borozzi had been apprehended and he gave a full report of what had allegedly transpired, he made no claim that Mirabile was the person who procured the innertube (R. 59). It seems unlikely that this important bit of evidence could have been forgotten by Rodriguez so shortly after the offense. Third: if Mirabile had, in fact, purchased the innertube in Laredo, Texas, a small town, it would not have been difficult for the Government to have located the person who sold it to him. The alleged seller was never produced, however, and the Government relied entirely upon the uncorroborated testimony of Rodriguez. More likely than not, Rodriguez himself was the procurer of the innertube and, in an attempt to exculpate himself, he shifted the blame to Mirabile (R. 60-61).

Shortly after 8:00 p.m. Borozzi was observed by members of the United States Border Patrol as he swam toward Laredo, Texas across the Rio Grande, pushing an innertube on which the suitcase of marihuana was perched (R.65-6). He was arrested a few minutes after he emerged from the water (R. 67). At the time of his arrest he was wearing a pair of pants and shoes and he had a sport shirt in his hip pocket (R. 69). In his pants pocket he had $297.00 in cash (R. 71), and he also had a wrist watch with him (R. 86). It is unlikely that he would have carried these valuables with him if they could have been given to a companion waiting to drive him home. Borozzi was taken to the county jail, and, after he was left there, the investigating officers returned to the river where they continued their surveillance without success. Neither Mirabile nor the automobile which he had been driving were observed (R. 82-83).

Forty-two hours after Borozzi's arrest, while Customs agents were at Borozzi's house in Baltimore, interviewing

the occupants, Mirabile arrived. The fact that Mirabile was back in Baltimore so soon after the arrest was bothersome to the Government, and the prosecutor argued that the defendant drove the entire distance from Texas to Baltimore without resting or even stopping for two entire days (R. 161). The Petitioner identified himself to the Customs agents, making no attempt at disguise. He surmised that Borozzi's ve. ure had failed, however, and because he did not want to be put in the position of being called upon to testify against a friend, he denied having been in Mexico with Borozzi (R. 118).

The Customs agents left, and when they returned the next morning, April 13th, they found Mirabile there with his girl friend, Jacqueline Gay. He had made no attempt to flee. Later that day, Mirabile, in response to a request, voluntarily appeared at police headquarters in Ba timore. He was formally interviewed by a Customs agent, and in the course of the interview he admitted that he had been in Mexico with Borozzi. He related that Borozzi had invited him to go to Mexico with him and that he had expected to smoke marihuana there (R. 97-98). On questioning, he revealed that he had left Borozzi in Mexico after an argument developed when the latter asked him to bring the marihuana into the United States in his car (R. 99-100). The Customs agent and two police officers searched the defendant and the automobile meticulously, extracting sweepings from various portions of the automobile. No marihuana could be found (R. 100-102).

The District Judge saw the witnesses and was able to assess their demeanor. If he had found Rodriguez's testimony of the events of April 10th entirely acceptable, he would not have entered a judgment of acquittal on the substantive charges against the Petitioner. Only the con-

spiracy charge was allowed to go to the jury, however, and the Petitioner was convicted only of this charge.

The indictment charged that the Petitioner committed crimes within the Southern District of Texas, and, as the District Judge properly instructed the jury, it was necessary for the Government to prove, beyond a reasonable doubt, that the Petitioner was a party to the alleged criminal enterprise when he left Texas for Mexico or when he returned to Texas from Mexico. The Government had a greater burden than that of merely showing that the Petitioner came to Mexico with Borozzi, for, as the Court declared in *Ingram v. United States*, 360 U.S. 671, 678 (1959), "Conspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." (Court's own emphasis). See also *Cuthbert v. United States*, 278 F. 2d 220 (5 Cir., 1960), where it was held that evidence of the defendant's association with a smuggler in a brief trip from Washington, D. C. to Laredo, Texas and Nuevo Laredo, Mexico and the presence of marihuana tracings on the defendant's clothing would not be sufficient to establish that the defendant had joined in a conspiracy to smuggle. See also: *United States v. Euphemia*, 261 F. 2d 441 (2 Cir., 1958); *Panci v. United States*, 256 F. 2d 308 (5 Cir., 1958); and *René v. United States*, 209 F. 2d 893 (5 Cir., 1954).

II. The prosecutor's admittedly improper conduct persisted in spite of Petitioner's protests.

The cross-examination of the Petitioner was marked by persistent and unjustified insinuations and accusations, some of which were wholly irrelevant to the charge and none of which were followed by any evidence. The prose-

cutor contented himself with suggestions that facts prejudicial to the defendant but not in evidence were known to the Government.

The first set of questions put to the Petitioner was designed to show the jury that he was a debased person who was living, in part at least, from the earnings of a prostitute. The prosecutor asked the Petitioner if he had any income other than that derived from his employment at his mother's tavern, and the Petitioner replied that he had none (R. 120). He then inquired whether the Petitioner knew a woman named Sarah Shapiro or Sally O'Malley. Counsel for the Petitioner objected to the question and asked the Court for a conference at the bench (R. 121). Without waiting for the Judge to afford counsel the opportunity to have the objection aired and a proffer made out of the presence of the jury, the prosecutor interjected: "Your Honor, the defendant has stated he had no other means of income. We intend to show he does have other means of income" (R. 121). Although counsel for the Petitioner protested that the prosecutor was merely offering to rebut an issue which he himself had raised, i.e., whether or not the defendant had other means of income, the Court permitted the line of cross examination to continue over objection (R. 121).

The Petitioner, in response to further inquiry, identified the woman in question as a barmaid at a night club in Baltimore and a person who had loaned him money from time to time and with whom he was purchasing a car. The prosecutor thereupon suggested that she was a prostitute working for the Petitioner and that the Petitioner shared in the earnings from the alleged prostitution. He said, "She is also a prostitute, is she not?" When the defendant replied that he did not know, the prosecutor pursued him with the question, "You don't know; you have never

received any money from her?" (R. 121). The Petitioner answered that he had borrowed money from her and that the two of them had been paying for a car together. Contrary to his representation to the Court, the prosecutor made no further effort to prov that the defendant had other means of income. The irrelevancy of this issue, moreover, demonstrates that the prosecutor could have had no other purpose than to impress the jury that the Petitioner was of such immoral character that he was capable of committing the crime charged and that he had, therefore, probably done it. His motive was made clear when, as will be developed below, he argued to the jury, without proof, that the defendant was "working" the woman who he claimed was a prostitute.

Aware of the fact that he had presented no evidence of any events in Baltimore prior to the trip which would tend to show that the Petitioner entered the conspiracy there, the prosecutor sought to supply the defect by suggesting to the Petitioner, without any intention of offering proof, that he, and not Borozzi, had initiated the smuggling scheme. He declared, "Isn't it true that in fact you did not—you were not approached by Nicholas Borozzi to come down here, and you approached him and told him you had the name of a man in Monterrey that could get some pot for you; you wanted him to go with you?" (R. 124-125). The Petitioner denied the suggestion, and, hinting that he had some secret source of information, the prosecutor asked, incredulously, "That isn't true?" When the Petitioner reiterated his denial, the prosecutor then asked if it was not true that the defendant had a friend in Baltimore whose last name was Hernandez (R. 125). The Petitioner replied that he did, in fact, have a friend by that name, and, insinuating that this friendship with a person of apparent

Spanish extraction assumed some sinister significance, the prosecutor underscored the name and said, "Hernandez; and he is a good friend of your, isn't he?" (R. 125). The Petitioner's friend was, the record shows, an automobile salesman who had no connection at all with either Borozzi's crime or the defendant's alleged participation in it. There was no effort made to prove any such connection and, as the record demonstrates, there was no basis for the prosecutor's insinuation. Surely, if there had been some foundation for it, Borozzi, who had already entered his plea, would have been called to the stand by the Government as part of its direct case or, at least, in rebuttal and the Petitioner would have had an opportunity to cross-examine him. Instead, the tactics of the prosecutor placed the Petitioner in a position where he was contradicted by an unsworn witness who could not be cross-examined.[3]

The prosecutor assailed the Petitioner's character further with an attempt to demonstrate to the jury that even at the time of trial he was guilty of immoral conduct. The Petitioner was asked the name of his girl friend and he replied, "Jacqueline Gay". The prosecutor inquired if she was then in Laredo, and, when the Petitioner said that she was, the prosecutor asked him to name the motel at which she was staying and the number of her room. When the defendant answered that she was staying in Room 306 of the La Posada Motel, the prosecutor quickly countered with the question, "What room are you staying in?" (R. 132). Counsel for the Petitioner objected to the obvious

[3] Other suggestions, implying an undisclosed source of reliable information, were made by the prosecutor throughout the cross-examination. At one point, for example, he said, "In fact, isn't it true that just prior to your leaving for down here, about three or four days prior to that, you and Nick Borozzi went down by the waterfront and smoked some marihuana, isn't that correct" (R. 124). The defendant denied the assertion, and it too was never followed up by proof.

irrelevancy and the objection was sustained, but the inference was unmistakable and the desired prejudicial effect was the same as if the question had been answered. This inquiry into a matter wholly foreign to any legitimate issue in the case could not have been made in good faith.

At the conclusion of the case for the defense, the Government presented no further evidence, and prior to the jury arguments, the District Judge held a hearing in his chambers. At this hearing, counsel for the Petitioner filed with the District Judge a requested instruction which would not reiterate the prejudicial material but which would simply remind the jury that, "The defendant is not on trial for any act or conduct not alleged in the indictment" (Supp. R. 5). Counsel for the Petitioner was disturbed by the tactics which were being employed against his client and he complained, "Your Honor, they are trying to show the fellow is living with people in hotel rooms, and has a girl friend named Sally O'Malley, and I think the prosecution attempted to bring in all sorts of misconduct not a part of this indictment" (R. 138). The District Judge replied only that he would think about the proposed instruction "a little bit" (Tr. 192). The prosecutor, as his subsequent conduct demonstrated, was unaffected by the defendant's protest.

In his argument to the jury, defense counsel emphasized the lack of evidence of events prior to the entry of the defendant into Mexico and the absence of any proof that the Petitioner could utilize such a large quantity of marihuana as was found upon Borozzi. He told the jury:

> "If you entertain any reasonable doubt, when you are in that jury room, it is your duty as jurors not to convict him.

"Now, a reasonable doubt can come in your minds, as His Honor will charge you, in a number of ways: Either in flaws in things that the Government tries to bring in, or in the proof that the defendant brings in, or even in the failure of the Government to produce evidence that they could have or should have produced.

"Now, they start out and they say these two boys came to Mexico. Well, everybody agrees they came to Mexico. You didn't hear any objections when the evidence went in about them coming in to Mexico. Nobody said that they weren't.

"But they said they must have gone down there to get marihuana. Now, where is a shred of evidence that this boy had a market for eighteen pounds of marihuana in Baltimore? Oh, he used marihuana, he smoked marihuana, and he admits it. But eighteen pounds of marihuana portends a commercial venture; and where is the slightest shred of evidence that this fellow had market for eighteen pounds of marihuana?

"Now, who was here? Mr. Riley was here from Customs, Mr. Loughman was here from Customs, from Baltimore. You saw Lt. Simonson from Baltimore. Probably the best investigators you will ever find. And if there was evidence of a ready market in Baltimore, Maryland, for this defendant, you would have seen that evidence on the witness stand. But there wasn't any" (R. 150-151).

The flaw in his case having been pointed out, and there being no evidence from which a counter argument could be made, the prosecutor, in an act of desperation, departed from the record and returned to his unproven claim that the defendant was a panderer and that a person who plied that contemptible trade had a ready market for marihuana. In his final argument, when the Petitioner had no opportunity to reply, the prosecutor declared:

> "They ask you the question, would this man have a market for eighteen pounds of marihuana? I submit he has. As a bartender in Baltimore he could sell it just every day. *If you are working Sally O'Mally, you can certainly get rid of it.*" (R. 166) (Emphasis supplied).

Counsel for the Petitioner objected immediately, protesting to the Court that the remark constituted misconduct. The objection was sustained without any admonition or comment by the District Judge, and, thereupon, the defendant moved for a mistrial. The motion was promptly overruled, and the prosecutor, enheartened by the lack of any restraint upon him, abandoned the evidence altogether and exclaimed, "He had a ready market for it, *I'm quite certain of that*, he and Nicholas Borozzi both." (R. 166-167) (Emphasis supplied).

Some time later, the District Judge, who had apparently realized the prejudice produced by the prosecutor's conduct, attempted to remedy it in the course of his charge. The Judge's comment, however, was such that, if anything, it compounded the error. If the significance of the prosecutor's argument had escaped any of the jurors, the Judge's remark brought it home. He referred to the prosecutor's unsupported suggestion as if it were evidence in the case, moreover, and, instead of firmly admonishing the jury to disregard it, he simply requested them to do so. He said:

> "There has been *testimony* referred to in the argument by the Government's counsel which suggests that he perhaps was living in part at least off the earnings of a prostitute. He is not charged with that offense. It is an irrelevant matter which apparently crept in when I was unaware as to what was coming. I will *ask* you not to consider that testimony as to any circumstance for any purpose." (R. 181) (Emphasis supplied).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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